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No. 00-839

In The

Supreme Court of the United States

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FSA, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATE OF LOUISIANA, AS *AMICUS CURIAE*, SUPPORTING THE PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

(1) Must a federal bankruptcy court's order affecting property rights in Louisiana be domesticated and enforced according to the statutes of the State of Louisiana, or may those statutes be completely ignored on the theory that the judgment is somehow "self-executing"?

(2) May a federal bankruptcy court order be so construed as to necessarily result in erroneous and inaccurate entries being maintained in the Louisiana public records, thereby irreparably damaging the integrity of the public records of the State of Louisiana?

LIST OF PARTIES

The State of Louisiana has no knowledge of any parties to the proceedings in the Court whose judgment is sought to be reviewed here other than those whose names appear either in the caption of the case or in the section entitled "List of Parties" in the Petition for a Writ of Certiorari. *See, Petition for Writ of Certiorari,* at ii.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

The State of Louisiana, as *Amicus Curiae*, through its Attorney General, hereby supports the Petition for a Writ of *Certiorari* in this matter, and respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 22, 2000.

OPINIONS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit was entered August 22, 2000, and is reported as *Regions Bank of Louisiana v. Rivet*, 224 F.3d 483 (5th Cir. 2000). The Opinion is also reprinted in the Appendix to the Petition for a Writ of *Certiorari* (hereinafter *"Petition"*), at pages A-1 through A-25. The Judgment and Order and Reasons of the United States District Court for the Eastern District of Louisiana, entered April 14, 1999, are reprinted in the Appendix to the *Petition* at pages A-25 through A-39. For briefing purposes, the term "opinion below" will refer to the Fifth Circuit's opinion.

STATEMENT OF JURISDICTION

The judgment of the oral argument at the United States Court of Appeals for the Fifth Circuit was entered on August 22, 2000, affirming in part and reversing in part the Order and Reasons of the United States District Court for the Eastern District of Louisiana, dated April 13, 1999. The jurisdiction of this Court is invoked by the Petition under 28 U.S.C. § 1254(1). This Brief is filed on behalf of the State of Louisiana, as *Amicus Curiae*, by its Attorney General, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States.

INTEREST OF THE STATE OF LOUISIANA AS *AMICUS CURIAE*

The State of Louisiana has a direct and specific interest in the resolution of the matters raised in this case in two respects:

(1) to ensure that the State's valid statutory enactments may not be ignored on the basis of the appellate court's interpretation that an order by a federal bankruptcy court is "self-executing" upon entry, and therefore that Louisiana's statutes relating to domestication and enforcement of such judgments may be ignored; and

(2) to ensure that the integrity of the State's public records is not compromised by the appellate court's interpretation of the effect of the entry of an order by a federal bankruptcy court.

The State of Louisiana also appeared as *Amicus Curiae*, in the United States Court of Appeals for the Fifth Circuit, to assert these same interests.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those Constitutional and statutory provisions set forth in the Petition (*Petition*, at 2-4), the State believes that this case also involves the following provision of the United States Code, which is set forth in pertinent part:

Title 28 U.S.C. § 1738:

> The Acts of the legislature of any State . . . of the United States . . . [and] The records and judicial proceedings of any court of any such State . . . [when] authenticated [pursuant to this Act], shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State- . . . from which they are taken.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

This action was originally commenced by Respondents pursuant to The Anti-Injunction Act, 22 U.S.C. § 2283, and The All Writs Act, 22 U.S.C. § 1651.

II. Statement of the Facts

The State of Louisiana hereby adopts the Statement of Facts contained in the Petition for a Writ of Certiorari. *See Petition*, at 4-8.

III. Course of proceedings and disposition in the Court below.

The State of Louisiana hereby adopts the statement of these items as contained in the Petition for a Writ of Certiorari. *See Petition*, at 4-8.

IV. The Opinion Below.

Similarly, the State of Louisiana concurs in Petitioners' description of the opinion below. *See Petition*, at 8-9. In addition, Louisiana believes that the following aspects of the opinion below will be of particular importance when considering the Petition for a Writ of *Certiorari*:

1. The opinion below creates a unique species of self-executing judgment, which finds no precedential support in any reported opinion. *Petition*, at A-11 to A-15, 224 F.3d at 490-491.

2. The opinion below effectively invalidates two Louisiana statutory enactments, La. R.S. 9:5251 and 9:5031, with no finding that they are unconstitutional, or that they have been preempted by an Act of Congress. *Petition*, at A-11 to A-15, and nn. 10 & 11; 224 F.3d at 490-491, nn. 10 & 11.

3. The opinion below invalidates, at least in part, Louisiana's statutory scheme for the domestication and enforcement of foreign judgments – also with no finding of unconstitutionality and no preemption analysis – by the unwarranted expedient of assuming that all items which might otherwise be determined by a State judge at a domestication hearing will have been conclusively decided by the rendering court. *Petition*, at A-11 to A-15, 224 F.3d at 490-491.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. Summary of Argument.

Stated succinctly, there are two basic reasons why the State of Louisiana believes that a Writ of Certiorari should be granted to review the opinion below, and that the decision should be vacated: (1) Louisiana cannot accept a situation where the order of a federal bankruptcy court is held to authorize private parties to ignore the State's valid statutory enactments. (2) The State of Louisiana cannot accept a situation where the issuance of a federal bankruptcy order is interpreted so as to compromise the integrity of the State's public records.

The opinion below has the effect of invalidating a State statutory scheme regulating both the domestication and enforcement of foreign judgments, including federal judgments, in Louisiana as well as the existence of liens and mortgages on Louisiana real property interests following the entry of the sale order of a federal bankruptcy court. The statutory scheme in question – consisting of La. R.S. 9:5031 and 9:5251; La. R.S. 13:4241 and 13:4242; and La. C.C.P. art. 2541 – is a hybrid. On the one hand this scheme is part of the State's system of regulating real property interests. La. R.S. 9:5031 and 9:5251. On the other hand it consists of the means by which the State provides for the domestication and enforcement of

foreign judgments in Louisiana.[1] Louisiana has a vital interest in both of these aspects of its statutory scheme and cannot accept a situation such as the one created by the opinion below, unless and until this validly enacted statutory scheme is held to have been preempted by the United States Congress. Heretofore, such preemption has not been found, and the opinion below does not even engage in a preemption analysis before it implicitly sweeps aside these legislative enactments.

In addition, the opinion below will inevitably have the effect – perhaps unintended, but nevertheless very pointed – of compromising, if not destroying, the integrity of the public records of Louisiana. If the integrity of Louisiana's public records remains thus compromised, the very foundation of Louisiana's entire civil-law system of property holding will also be called into question. Thus, not only is the integrity of Louisiana's public records at issue, but the opinion also infringes impermissibly on Louisiana's right, secured by the Tenth Amendment, to regulate the real property within her borders.

Conversely, no legitimate federal interest, nor any interest secured by the Bankruptcy Code, is served by the opinion below. Louisiana does not question the right of a bankruptcy court to enter an order, pursuant to the Bankruptcy Code, mandating that property of a bankrupt estate be sold free and clear of liens and encumbrances, nor does it question the effectiveness of that order as between the parties thereto. Rather, the Louisiana statutory scheme merely places such orders in the same position as all other federal judgments, as well as all sister-state judgments, by requiring that the rights granted thereunder must be secured through the remedy of domestication and enforcement of the judgment in Louisiana.

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[1] In conformity with the Uniform Enforcement of Foreign Judgments Act (revised 1964), La. R.S. 13:4241 defines the term "foreign judgment" to include all federal judgments.

II. The State of Louisiana cannot accept a situation where its valid statutory enactments are simply ignored based upon the entry of a bankruptcy court order.

La. R.S. 9:5031 and 9:5251 clearly mandate that no mortgage or other form of security interest in Louisiana real property may be "in any manner affected", as the result of a sale in bankruptcy, except through the domestication and enforcement in Louisiana of the bankruptcy order and judgment. La. R.S. 13:4241 and 13:4242, and La. C.C.P. art. 2541, provide a clear and orderly procedure for the domestication and enforcement in Louisiana of all foreign judgments, including federal bankruptcy judgments. The effect of the decision below is, by judicial *fiat*, to invalidate completely La. R.S. 9:5031 and 9:5251, and to invalidate at least partially La. R.S. 13:4241 and 13:4242, and La. C.C.P. art. 2541.

The State of Louisiana concurs with Petitioners that such invalidation of the valid legislative enactments of a State may not be accomplished by the federal courts, absent a ruling that the statutes are unconstitutional or that they have been preempted by an Act of Congress. *See Petition*, at 15-19. The State also concurs in Petitioner's assessment of the decision below that no such rulings have been made. *Id.*[2] In the interest of brevity, these

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[2] The opinion below did not engage in a preemption analysis. It simply dismisses that doctrine by holding, in essence, that Louisiana's system of domestication and enforcement did not need to be preempted since Respondents "did not need to take further steps to 'execute' the bankruptcy court's orders". *Petition*, at A-14 to A-15, 224 F.3d at 491. This ruling, however, embodies the very essence of preemption. The Louisiana statutory scheme clearly mandates that the bankruptcy order *did* have to be executed through domestication and enforcement. This scheme is rendered nugatory through the creation of a species of "self-executing" judgment based upon the Bankruptcy Code. *See Petition*, at

arguments will not be repeated. The purpose of this brief is to add Louisiana's voice to Petitioner's request for a Writ of *Certiorari*, and to request that the decision below be vacated. The purpose of this section is to present the interest of the State of Louisiana underlying its statutory scheme for the domestication and enforcement of foreign judgments. The State deems this discussion to be necessary, because of the short shrift given this position by the opinion below. *See Petition*, at A-12 to A-14, and 224 F.3d at 491.

Louisiana agrees with Petitioners that this case should be controlled by the analysis of *Baker by Thomas v. General Motors Corp.*, ___ U.S. ___, 118 S.Ct. 657, 664-665, 668 (1998) (Ginsburg, J.) (Scalia, J., concurring), a case and an issue which the opinion below declines even to discuss, despite extensive briefing by Petitioners and the State as *Amicus*. Thus, the opinion below fails to recognize the most basic principle in the law of judgments: the dichotomy between right and remedy. A judgment declares rights, but those rights must be secured through

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12-15. Thus, the Louisiana statutory scheme is invalidated by a ruling under the Bankruptcy Code, and that, by any other name, is preemption. Yet, the opinion below expressly disavows even any attempt at a preemption analysis, merely stating the obvious precept that "[P]reemption *may be implied* if state and federal laws conflict. . . . ". *Petition*, at A-14, n. 13, 224 F.3d at 491. This passing reference, however, falls far short of the rigorous analysis required by this Court's precedents in order to decide whether or not a state statute has been preempted by an Act of Congress. *See, e.g., Davis v. Davis (In re Davis)*, 170 F.3d 475, 482, 483 (5th Cir.) (*en banc*) (Jones, J.), *cert. denied*, 120 S.Ct. 67 (1999). *Petition*, at 15-19. Even if such an analysis were to be undertaken, it cannot rationally be said that the Louisiana statutory scheme in question "thwarts the 'accomplishment and execution' of Congressional intent", as expressed in the Bankruptcy Code. *See Davis v. Davis, supra*, 170 F.3d at 483, *quoting, Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983).

the remedy of enforcement. This principle has long been recognized by the decisions of this Court, which, in 1873, for example, held that:

> "No execution can issue upon [foreign] judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but only that which the lex fori gives to them by its own laws in their character of foreign judgments."

Thompson v. Whitman, 85 U.S. 457 (18 Wall), 462-463, 21 L.Ed. 897 (1873), *quoting*, J. Story, *Conflicts of Laws*, § 609 (7th ed. 1872), *quoted in*, *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 292, 8 S.Ct. 1370, 1375, 32 L.Ed. 239 (1888), and in *Baker by Thomas, supra*, 118 S.Ct. at 668 (Scalia, J., concurring).

Perhaps even more pointedly, as Justice Scalia put it:

> It has long been recognized that "the judgment of a state Court cannot be enforced out of the state by an execution issued within it."

Id., quoting, McElmoyle ex rel. Bailey v. Cohen, 13 Pet. 312, 325, 10 L.Ed. 177 (1839). *See also* Restatement (Second) of Conflicts of Laws § 99 (1971) ("The local law of the forum determines the methods by which a judgment of another state is enforced").[3]

Petitioners have convincingly demonstrated that the opinion below reaches its result through the expedient of

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[3] Strictly, *Baker by Thomas* applies only to the situation where the judgment of one state is to be enforced in another state, and indeed this is the extent of the Constitution's Full Faith and Credit Clause. U.S. Const., art. IV, § 1. It is respectfully submitted, however, that this analysis must also embrace the situation at bar, where the judgment of a federal court is to be enforced in a state. The first Congress essentially brought the federal courts within the ambit of full faith and credit with the passage of the Full Faith and Credit Act, 28 U.S.C. § 1738.

creating a "self-executing" judgment, which finds no support in the decisions of this Court. *See Petition*, at 12-15.[4] To this, the State would add that such a species of judgment violates further the decisions of this Court, as discussed above, by its very nature, in failing to recognize the right/remedy dichotomy. A "self-executing" judgment presents no different a situation than that so forcefully disavowed by Justices Ginsburg and Scalia. Such a judgment is in reality no more than an execution, *albeit*, a "self-execution", issued by one sovereign (the United States) which that sovereign decrees must be enforced within the jurisdiction of another sovereign (Louisiana). Based upon this Court's precedents, such a decree cannot be allowed to stand.

We may state in plain terms why Louisiana's interest is concurrent with that of Petitioners: Petitioners seek a recovery precisely because the procedures mandated by Louisiana statutes for the cancellation of mortgages were not followed by parties who had obtained the right to have their mortgage cancelled. Thus, according to Louisiana law, Petitioners' mortgage was not cancelled or "in any manner affected". La. R.S. 9:5251. The federal courts have declared that the statutes embodying these procedures are meaningless and may be ignored by the parties who had obtained the right to have Petitioners' mortgage cancelled. This is unacceptable to Louisiana, and indeed should be unacceptable to any other state. Under the Court of Appeals' logic, the "self-executing" rationale need not be limited to bankruptcy courts. Virtually any federal judgment declaring the respective rights of private parties could next be deemed "self-

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[4] Indeed, this is plain from the language of the opinion itself: "At the heart of [Petitioners'] argument is the assumption that the bankruptcy court's orders were not self-executing. . . . [T]he Bank did not need to take further steps to 'execute' the bankruptcy court's orders." *Petition*, at A-12, A-15, 224 F.3d at 490-491.

executing", thus relieving litigants of following Louisiana's statutes on anything from automobile title transfer to corporate formalities.[5] This departure from the fundamental basis of federalism is as far-reaching as it is unwise.

Indeed, the *en banc* Fifth Circuit itself, a mere seventeen months prior to the decision below, enunciated the principle that a self-executing judgment would violate the right-remedy dichotomy, specifically in the context of the Bankruptcy Code, in holding that the Code did not authorize the "self-execution" of a bankruptcy order in violation of the laws of the State where enforcement is sought. In *Davis v. Davis, supra,* the Fifth Circuit dismissed out of hand the argument that judgments pursuant to the Bankruptcy Code were "literally self-executing [because in so arguing] [appellant] has confused her right with her remedy". 170 F.3d at 481. *See also Riley v. New York Trust Co.*, 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885, *rehearing denied*, 315 U.S. 829, 62 S.Ct. 903, 86 L.Ed. 1223 (1942); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 (1935) (holding that, at common law, a judgment of a sister state could not be enforced without the commencement of an action based thereon).

The confluence of the right/remedy dichotomy and our system of dual sovereignty is expressed in the Full Faith and Credit Clause, U.S. Const., art. IV, § 1, and the Full Faith and Credit Act, 28 U.S.C. § 1738, which essentially brings the United States and the federal court system within the ambit of Full Faith and Credit. The inherent conflicts therein have been resolved by the widespread adoption of the Uniform Enforcement of Foreign

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[5] For example, this office opined in 1993 that a foreign paternity judgment must be made executory in Louisiana before it may be used to alter State administrative records and vital statistics. Op.Atty.Gen., No. 93-554, August 13, 1993.

Judgments Act (revised 1964) ("Uniform Act").[6] A comprehensive discussion of the Uniform Act is beyond the scope of this brief, but the State feels it necessary to make the following points:

Two of the three Louisiana enforcement statutes at issue, La. R.S. 13:4241 and 13:4242, have been passed by the legislature in conformity with, and adoption of the Uniform Act, and the third, La. C.C.P. art. 2541, actually provides an even more streamlined method of enforcing a foreign judgment. The more recent, and more well-reasoned, state cases have held that the Uniform Act applies to federal judgments as well as to those of sister states. *See, e.g., Osteoimplant Technologies v. Rathe Products*, 107 Md.App. 114, 666 A.2d 1310, *cert. denied*, 341 Md. 648, 672 A.2d 623 (1995) (holding that a default money judgment awarded in federal court could not be vacated, altered or amended in state court, under full faith and credit principles). Louisiana has no judicial authority to the contrary. In this light, then, we may posit that Louisiana, by virtue of her own laws, as well as 28 U.S.C. § 1738, would have been required to give full faith and credit to the bankruptcy order (or at least the eventual judgment of the district court), had that judgment been presented to a Louisiana court for enforcement. Indeed, this principle is of ancient provenance. *See, e.g., Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813) (Storey, J.); *Hampton v. McConnell*, 16 U.S. (3 Wheat) 234, 236-237, 4 L.Ed. 378 (1818) (Marshall, C.J.). The sole point at issue here, however, is whether or not that judgment *had to be* so presented to a Louisiana court for domestication and enforcement.[7] The State respectfully submits that it did.

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[6] At all times pertinent to this matter, Louisiana had adopted the Uniform Act. *See* La. R.S. Ann. Title 13, Part III (Table) (West Supp. 2000) (including laws enacted through the 1999 Regular Session of the Louisiana legislature), La. R.S. 13:4241 to 13:4247, as added by Acts 1985, No. 464, § 1.

[7] Petitioners maintain that the bankruptcy court order may not now be enforced because the right to seek enforcement has

The opinion below essentially brushes aside the State's interest by stating, without evidence or analysis, that domestication and enforcement are unnecessary, and mere surplusage, since the items which may be raised as valid defenses at a domestication hearing, at least in this instance, were "determined by the bankruptcy court and by the district court". *Petition*, at A-13 to A-14, 224 F.3d at 490-491 (footnote omitted). In so doing, the opinion below misapprehends the very purpose of such a hearing in our system of multiple sovereignties, by ignoring the valid interest of the State in ensuring that potential defenses, as well as other issues incident to domestication, be determined by a Judge and not through the expedient – implicit in the opinion below – of casting a Parish Recorder of Mortgages in a *quasi*-judicial role by merely presenting her with a bankruptcy court order and a request to cancel the subject lien or encumbrance.[8]

It is well-settled that full faith and credit is not absolute, and that there may be valid defenses to the domestication and enforcement of a foreign judgment. For a

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expired under Louisiana law. *Petition*, at 19, n. 11. The State takes no position with respect to the merits of this contention. The State does concur, however, that this contention is one that must be decided pursuant to Louisiana law.

[8] While it is true that most of the precedents in this area, have, *per force*, dealt with the enforcement of money judgments, *Baker by Thomas, supra*, makes it clear that this principle also applies as well to the enforcement of other kinds of judgments. *See* 118 S.Ct. at 664-665 (Ginsburg, J.) ("The Court has never placed equity decrees outside the full faith and credit domain"). Justice Scalia, concurring, also makes this clear in stating that "neither the Full Faith and Credit Clause nor its implementing statute requires [the forum state] to execute the [sister-state] injunction" (118 S.Ct. at 668-669), and by relying, *inter alia*, upon *Watts v. Waddle*, 6 Pet. 389, 392, 8 L.Ed. 437 (1832) (a case involving a suit to obtain an equity decree ordering the conveyance of land, duplicating such a decree already issued in another state).

discussion of the various reasons why a foreign judgment, though entitled to full faith and credit, may validly be denied enforcement in the forum state, *see* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md.L.Rev. 412 (1994). *See also Tennessee ex rel. Sizemore v. Surety Bank*, 200 F.3d 373 (5th Cir. 2000) (holding that, under the Uniform Act, a Texas bank was entitled to challenge the jurisdiction of a Tennessee court to order liquidation of an insurance company, even after Texas had issued a domestication order); Fed.R.Civ.P. 60(b)(3), which permits verdicts to be set aside if they were procured by "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misrepresentation of an adverse party".

Similarly, Louisiana courts have denied enforcement to foreign judgments for lack of personal or subject matter jurisdiction in the rendering court, extrinsic fraud in the procurement of the judgment, satisfaction, or lack of due process in the rendering court. *See WellTech, Inc. v. Abadie*, 666 So.2d 1234 (La. App. 5th Cir.), *rehearing denied, writ denied*, 672 So.2d 690 (La. 1996), *writ denied*, 712 So.2d 864 (La. 1998). *See also Lepard v. Lepard*, 722 So.2d 367 (La. App. 2nd Cir. 1998) (holding that full faith and credit may be denied for lack of jurisdiction in the rendering court or where collateral attack would have been permitted in the jurisdiction that rendered the judgment). Louisiana's point here is that these defenses, if available and properly raised, must be heard and determined by a Louisiana court when enforcement is sought in Louisiana. One would expect this to be a routine matter in the vast majority of cases, but it is an important step which may not and must not be ignored. These issues may not be conclusively presumed to have been determined by the rendering court, as the opinion below posits is the case

for bankruptcy court orders. *Petition*, at A-13 to A-14, and n. 12; 224 F.3d at 4990-491.[9]

Finally, the foregoing, though an accurate synopsis, has perhaps been unduly emphasized here, given the context of the facts of this matter. The basic purpose of Louisiana's appearance as *amicus curiae* is to protest vigorously against the appellate court's creation of a self-executing judgment. Nevertheless, while Louisiana insists on her right not to enforce foreign judgments until they have been properly domesticated, she does not suggest that bankruptcy court orders such as the one in question would not be enforced in Louisiana. There is nothing in La. R.S. 9:5031 or 9:5251 which contemplates that such orders would not ultimately be enforced. Indeed, those statutes expressly refer the reader to the statutory provisions which constitute Louisiana's adoption of the Uniform Act. La. R.S. 13:4241 through 13:4247. *See also* La. C.C.P. art. 2541. Louisiana does insist, however, that proper supervision of her civil-law system of property holding, embodied in part by the public records doctrine, requires that the cancellation of mortgages, and the erasure of inscriptions from the public records, pursuant to a non-Louisiana judgment, be placed in the hands of a Judge, and not those of a Parish Recorder of Mortgages. The appellate court's creation of a self-executing judgment actually contemplates that a bankruptcy court may invalidate a Louisiana real property right,

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[9] Nothing in this discussion is intended to suggest that a party against whom domestication of a judgment is sought would not be precluded from re-asserting any of these issues that were actually determined by the rendering court. *See Durfee v. Duke*, 375 U.S. 106, 116, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) (noting that when the "jurisdictional issues [have] been fully and fairly litigated by the parties and finally determined . . . further litigation [is] precluded"). *See also* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 54 Md.L.Rev. 412, 427-433 (1994).

which is recorded in the public records, and that Louisiana *not even need be informed*. Put simply, that is unacceptable.[10]

III. The State of Louisiana cannot accept a situation where the integrity of its public records is compromised by the entry of a bankruptcy court order.

It is simply unacceptable for a federal court to ignore, indeed to authorize non-compliance with, valid State statutory enactments unless and until those statutes have either been held to be unconstitutional or to have been preempted by the Congress. For the opinion below to do so, under the specific facts and circumstances at bar, is particularly egregious. This is so because the most potentially far-reaching effect of the opinion below is to compromise, if not destroy, the integrity of Louisiana's public records.

The Louisiana Constitution, Civil Code, and Revised Statutes, in effect, work together to create the "public records doctrine" by declaring that a variety of security and ownership interests in immovable property are ineffective against third persons in the absence of recordation, in the appropriate public records, of the documents creating or asserting those interests. *See* William V. Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tul.L.Rev. 491 (1965); La. Const. art. 19, § 19 (1974); La. Civil Code art. 2266; La. R.S. 9:2721. Among the objectives of this doctrine directly pertinent here is to establish a positive force to recorded instruments, so as to allow non-parties to rely on the recorded

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[10] Moreover, it is undisputed that the mortgage in question was never actually cancelled under State law, its inscription never erased from the public records, and that it remains recorded there to this day. *Petition*, at 14, n. 7. This fact brings squarely into focus Louisiana's vital interest in the integrity of her public records. This aspect of the decision below will be discussed in the next and concluding section.

document and to be protected in acquiring rights based on those documents. *See* Lee Hargrave, *Public Records and Property Rights*, 56 La.L.Rev. 535, 537 (1996).

In Louisiana, as long as a mortgage has been validly recorded and not erased, that mortgage is conclusively presumed to exist in the eyes of the State. *See Phillips v. Parker*, 483 So.2d 972, 975 (La. 1986). The basic notion is that in creating real rights that bind property in the hands of subsequent owners, fairness requires that one give the subsequent owners an opportunity to learn from an authoritative source that the property is so bound. *See* Alejandro M. Garro, *The Louisiana Public Records Doctrine and The Civil Law Tradition*, 97-98 (1989).[11]

It is indisputable that the "public records doctrine" is absolutely basic to the Louisiana civil-law system of property holding. *See McDuffie v. Walker*, 51 So. 100 (La. 1909) (establishing the principle that Louisiana is a "record notice" jurisdiction). It follows, therefore, *a priori*, that the State of Louisiana has a vital public interest in the integrity of the public records in order to ensure, as nearly as possible, that Louisiana citizens, and indeed all persons dealing in property in Louisiana, be able to rely on the accuracy of those records. *See, e.g., Matter of De La Vergne*, 156 B.R. 773, 776 (Bkrtcy.E.D.La. 1993) (holding that all persons are conclusively presumed to have notice of the existence of all mortgages recorded on the mortgage rolls); *Amoskeag Bank v. Chagnon*, 133 N.H. 11, 572 A.2d 1153 (1990) (discussing the necessity to maintain the integrity of

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[11] Ownership of an immovable is the basic "real right", and any agreement transferring ownership of immovables is subject to the recordation rule in Louisiana. La. Civil Code, art. 517. Similarly, the right of mortgage, such as the mortgage rights underlying the instant controversy, is also a real right which the Civil Code requires to be recorded in the registry for recording mortgages. La. Civil Code, art. 3271. *See also* 1 Peter S. Title, *Louisiana Real Estate Transactions*, § 8.13, at 181 (1991).

the public records).[12] Moreover, the administration of the public records, through legislation such as the statutes involved herein, is among the ways in which Louisiana regulates the real property interests within her borders, and the right to so legislate is reserved to the State by the Tenth Amendment. *Sunderland v. United States*, 266 U.S. 226, 227, 45 S.Ct. 64, 69 L.Ed. 259 (1924) ("[t]he Tenth Amendment gives to the State the exclusive right to legislate concerning the lands within her borders . . . "); *United States v. Fox*, 94 U.S. 315, 320 (1876). *See also Clarke v. Willard*, 294 U.S. 211, 55 S.Ct. 356, 79 L.Ed. 865 (1935); *Security Trust Co. v. Dodd, Mead & Co.*, 173 U.S. 624, 19 S.Ct. 545, 43 L.Ed. 835 (1899); *Hervey v. Rhode Island Locomotive Works*, 93 U.S. (3 Otto) 664, 23 L.Ed. 1003 (1876); *Green v. Bushkirk*, 72 U.S. (5 Wall.) 307, 18 L.Ed. 599 (1866) (establishing the proposition that every state has the jurisdiction to determine for itself the nature and extent of property within its territorial limits which will be considered liable to seizure and sale under the process of its courts).

In this light, even if the panel below had engaged in a preemption analysis with respect to La. R.S. 9:5031 and 9:5251, both this Court and the Fifth Circuit, *en banc*, have made it clear that, in any such analysis, Courts must apply:

> . . . a presumption that areas of law traditionally reserved to the states, like police powers or *property law, are not to be disturbed absent the "clear and manifest purpose of Congress"*.

Davis v. Davis, supra, 170 F.3d at 482, *quoting, Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.2d 1447 (1947) (emphasis added).

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[12] Indeed, this very principle, while particularly pertinent in the modern day to state law, may in fact be gleaned from the early jurisprudence of this Court. *See, e.g., Anthony v. Butler*, 38 U.S. (13 Pet.) 423, 10 L.Ed. 229 (1939); *Dick v. Balch*, 33 U.S. (8 Pet.) 30, 1 L.Ed. 856 (1834); *Levinz v. Will*, 1 U.S. (1 Dall.) 430, 1 L.Ed. 209 (1789); *Parker v. Wood*, 1 U.S. (1 Dall.) 436, 1 L.Ed. 212 (1789).

This presumption militates against any finding that La. R.S. 9:5031 and 9:5251 have been impliedly preempted by Congress by enacting the Bankruptcy Code. Moreover, it would seem clear that the Bankruptcy Code does not expressly preempt state laws regulating real property interests. *See Davis v. Davis, supra,* 170 F.3d at 483.

Here, we emphasize once again that La. R.S. 9:5031 and 5251 clearly mandate that no mortgage or other form of security interest in Louisiana real property may be "in any manner affected" as the result of a sale in bankruptcy, except through the domestication and enforcement in Louisiana of the bankruptcy order and judgment.[13] Particularly in light of the constitutional principles, and the fundamental importance of the public records doctrine, the appellate court should not have simply ignored the effect its ruling would have on the integrity of that doctrine. Indeed, the public records doctrine is not even addressed by the opinion below, despite extensive briefing by the parties and the State as *Amicus Curiae*. Yet, there can be no dispute that the effect of this ruling, in addition to judicially invalidating valid legislative enactments that have not been found to be unconstitutional or preempted by Congress, will be to destroy the integrity of Louisiana's public records.

Indeed, there can be little doubt that the opinion below, if allowed to stand, will have the deleterious effect we have outlined. The mortgage remains on the public records after fourteen years, and the opinion below has in effect authorized the owners of the mortgaged property to

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[13] Louisiana law also provides that a mortgage shall not be erased as the result of the discharge in bankruptcy of the mortgagor. *See Socony Mobile Oil Co. v. Burdette,* 309 So.2d 655, 656-657 (La. 1975); *Ferguson v. Porter,* 359 So.2d 676 (La. App. 1st Cir. 1978). *See also Property Asset Management v. Pirogue Cove Apts.,* 693 So.2d 1217 (La. App. 4th Cir. 1997) (holding that a mortgage, as an accessory obligation, is enforceable, whether or not the mortgagor is personally responsible for the obligation the mortgage secures).

treat it as if the mortgage did not exist. Petitioners maintain that the order of the bankruptcy court cannot now be enforced, so as to have the mortgage cancelled and its inscription removed from the public records. *See Petition*, at 19, n. 11. If Petitioners are correct, and if the opinion below is allowed to stand, then, at least in this instance, the public records of Louisiana will be demonstrably inaccurate.[14] It does not take a great leap of imagination to posit that there may be many and numerous other instances where the public records will also be rendered incorrect as the result of similar bankruptcy court orders.[15] We must therefore conclude yet again that the actual and potential harm done to vital interests of the State of Louisiana is not offset by any reciprocal federal interest in letting stand the opinion below. The State statutes involved attempt in no way to negate ultimately the order of the bankruptcy court. Indeed, La. R.S. 9:5031 and 9:5251 provide by express language that the cancellation of mortgages, and the removal of their inscription from the public records, as ordered by a bankruptcy court, may be fully accomplished through the simple expedient of domestication and enforcement of the bankruptcy order.[16] This puts

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[14] The State of Louisiana concurs in Petitioners' exposition of the various ill effects that this state of affairs will have on Louisiana's public records. *See Petition*, at 21-23. In the interest of brevity, this discussion will not be repeated here.

[15] Similarly, as discussed in the preceding section, one might imagine, and one must ponder, what other legislative enactments of the State of Louisiana may be effectively invalidated by the fiat of a bankruptcy court, or any other federal court, if the power implicit in the opinion below is allowed to stand unchecked.

[16] In the normal and anticipated circumstance, when a sale of property is ordered free and clear of liens and encumbrances, pursuant to 11 U.S.C. § 363(f)(3), the proceeds of the sale will be sufficient to satisfy all such liens and encumbrances. The lien or encumbrance then is not merely extinguished but transferred to the proceeds of the sale, and ultimately satisfied. In this

the holder of a bankruptcy judgment in no different a position than the holder of any other federal judgment, while at the same time allowing the Louisiana courts to monitor the integrity of the public records. If one were to weigh the interests advanced by Congress in the Bankruptcy Code against those of the State of Louisiana in the integrity of her public records, the scales would seem to tip decisively in Louisiana's favor.

CONCLUSION

For the reasons set forth herein, the Petition should be granted, and a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit. Further, the decision below should be vacated, and the Louisiana statutory scheme in question should be upheld.

Respectfully submitted,

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situation the purchaser of the property may, if necessary, simply convoke a summary mandamus proceeding to procure the order of a State court that the mortgage be cancelled and that the Recorder of Mortgages erase the inscription thereof, based upon satisfaction. La. Civil Code art. 3337. Moreover, under La. R.S. 9:5385, the holder of a Mortgage note who fails to surrender the note when it is satisfied is liable for damages resulting from such failure. As far as the State is aware, however, during the seven-year course of this litigation, Respondents have advanced no claim that the subject mortgage was in fact satisfied in the bankruptcy proceeding.